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Stuart Staker v. Noal D. Ainsworth : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STUART STAKER, Plaintiff/Respondent, v. NOAL D. AINSWORTH, et al., Defendants/Respondents,	
	Case No. 870166
NOAL D. AINSWORTH, et al., Plaintiffs/Respondents v. CONRAD G. MAXFIELD, et al. Defendants/Appellants.	

BRIEF OF RESPONDENT STUART STAKER

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JURISDICTION

The Supreme Court of the State of Utah has jurisdiction pursuant to Utah Code Ann. Section 78-2-2.

ISSUES ON APPEAL

The issue to be decided is whether a number of houses and fence lines were erroneously placed based on one or more mistaken surveys, establish or become the basis for boundary by acquiescence.

STATEMENT OF THE CASE

Some of the statements made by appellants are not quite accurate and therefore need to be stated correctly or amplified in order to give this Court a proper understanding of the case.

The lawsuit brought by respondent Staker was not only against the Ainsworths and the Holmes, but also against the Yokums and the Shanes. Because of some confusion in land ownership, the Shanes were initially identified as John Does 1 and 2 but the property belonging to the Shanes was always the subject of respondent Staker's lawsuit from the beginning. A separate action was begun by respondents Ainsworth against appellant Maxfield.

The two cases were combined on the motion of respondents Ainsworth in January of 1986. The attempt was to have all of the property boundary lines in the entire area resolved at once and in one hearing. Appellant Maxfield attended

the hearing on the motion to consolidate and even noticed up the hearing himself.

The affidavits on file and the County Recorder's records reflect that from the time of the original patent to the present, the Holmes' property was held by parties different from those who are in the chain of title to the Staker property. R. at 74-75, 120-121. The records also reflect that physical boundaries between the Staker and the Holmes' properties were set at least at the turn of the century. Id. That is particularly true of the home built initially on the Holmes' property and now the residence of the Shanes. Id. However, according to what now appears to be a correct survey, the record property boundary runs through the middle of the Shane house. R. at 116-117.

Each of the parcels in question in this case have the following consistent characteristics:

1. All of the fence lines in question in these combined cases (consisting of six separate east-west fences), are each approximately the same distance from the record boundary based on the current survey.

2. The fence lines in question have been in existence since the early 20's if not before. See, e.g., R. at 74-75, 120-121, 138-140, 190-192.

3. There has been at least one survey of the properties in question which was taken in the early 20's, which survey now appear to be erroneous based on what appears to be the

use by that surveyors of an incorrect starting point. R. at 163-165.

4. None of the parties to this action nor their predesessors in interest have used any land beyond their fences. See, e.g., R. at 138-140.

Up to the time of the sale to appellant Utah National of the appellants' property in question, apparently everyone in the general area treated the fence lines as the proper boundaries between properties. Upon appellant Utah National's purchase in 1972 of their property in dispute, appellant Utah National had the former owner quit claim to it that property between the fence line on the south of appellants' property and the boundary line according to a recent survey. R. at 113-115. That is the property which the Ainsworths have claimed over the years because it is within their fenced boundary. See, e.g., R. at 93-94.

SUMMARY OF ARGUMENT

Respondent Staker in his motion for summary judgment asked the lower court for a determination that either the surveyed boundary lines or the fence lines were the true boundaries to his property, believing and arguing, however, that the fence lines were the more appropriate boundary of the two. Now that the lower court has found in favor of the fence lines, respondent Staker believes that that decision should be supported due not only to the long existence of the boundaries between Staker and his neighbors on both the north and the south, but

also due to the pattern of fences which have been established throughout this area as evidenced by the claims of other parties to this litigation. With that pattern existing due to at least one, if not more, erroneous surveys performed many years ago when surveying in rural areas was primitive at best, it now appears that the burden is on appellants to establish that there is no objective uncertainty by which the fence lines in question were established. Appellants have not only not met this burden, they have not even attempted to meet this burden. Therefore, the judgment of the lower court should be sustained.

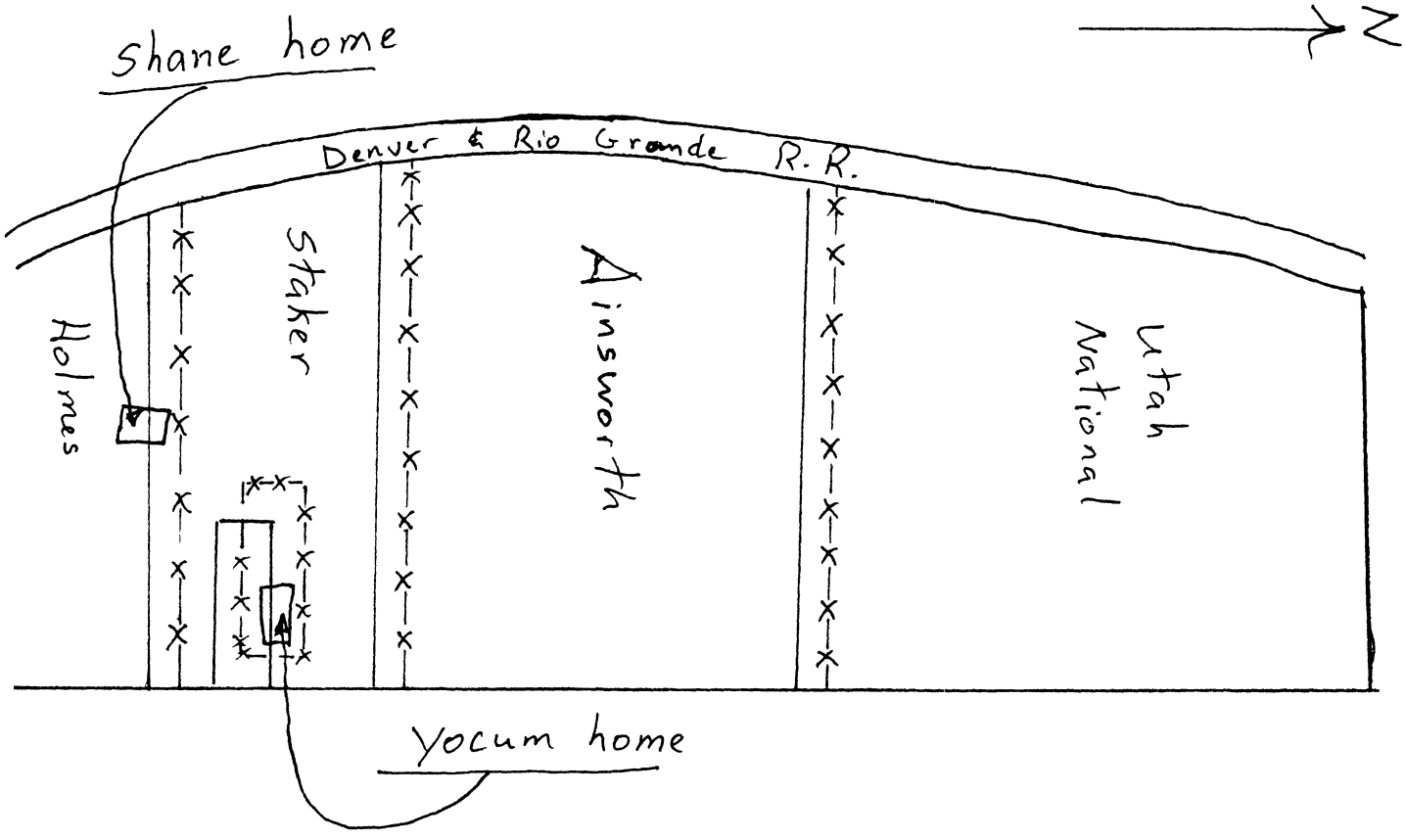
ARGUMENT

Despite the advice in Robert Frost's poem "Mending Wall" that good fences make good neighbors, Frost also said, "Something there is that doesn't love a wall." In this case, out of all of the parties to this action, only appellants do not love a wall. When appellants acquired their property, it is obvious that they had had the benefit of a recent survey which reflected that between the fence on the south of their parcel and the south survey boundary line, there was a gap of some 75 feet.

None of the material facts behind that purchase were before the lower court except for the fact that the parcel appellants are claiming in this action was quit claimed to them. The fact that there was a quit claim instead of a warranty deed to that 75+ foot strip, however, tells the whole story. Appellants knew that in order to secure the strip for their use,

there would have to be the kind of lawsuit in which the parties are presently engaged. But at no time have appellants actually tried to use the strip of land which they are now claiming.

For the Ainsworths and Staker, if the current survey line is to be the true boundary line, then they both pick up property to the south while losing property on the north. If the fence lines are the true boundary, then the reverse is true. In either case, the total amount of their acreage remains almost exactly the same. Under the former scenario, the losers are the Holmes', the Shanes' and the Yokums'. The Holmes' and their predesessors in interest have been using their land up to the fence line for many years. (R. at 118-121.) The Shanes' house, which they recently purchased from the Holmes, would be divided in half by the survey boundary line. For the Yokums, the shift in the boundary line means they would totally lose their house. (See diagram below). If the fence lines are the boundary, the only losers are the appellants who lose a strip of land they have never used and to which they hold title by quit claim.



This does not mean that this case should be decided solely on the basis of equities, although on that basis there is no question that the lower court was correct. However, what it does say is that this case is more than just a dispute between appellants and the Ainsworths. It calls for a readjustment of large parcels of land and brings about a transfer of usage of some 6 or 7 acres of land.

POINT I

THE ERRONEOUS SURVEYS CONSTITUTE THE OBJECTIVE UNCERTAINTY

There is no dispute that with the recent boundary by acquiescence cases, (Halladay v. Cluff, 685 P.2d 500 (Utah 1984); Stratford v. Morgan, 689 P.2d 360 (Utah 1984); Parsons v. Anderson, 690 P.2d 535 (Utah 1984)) this Court has redefined the tests for determining if a particular fence line constitutes the boundary between two parcels of ground. In those series of cases, this Court has indicated that there is a necessity of establishing objective uncertainty which the fence line or other visible marker was meant to resolve. (Two of the cases, however, did not actually turn on that issue. In Halladay, this Court found that the parties claiming boundary by acquiescence actually knew of the true boundaries during the period necessary for acquiescence. In Parsons, there was no showing that there was mutual acquiescence for the requisite minimum of 20 years.) The obvious purpose of this test is to supply the legal substitute for a written agreement between adjoining landowners that a fence or other visible monument serves as the boundary between them. This development in the law is to guard against a claim of ownership based solely on the fact that one property owner does not object for some time to his neighbor using his property.

This Court in its line of decisions has indicated that a survey is the best measure by which a true boundary is to be determined. Thus in cities or well developed areas, it will be difficult for anyone to claim land not actually covered by deed

or written agreement. This changes, however, when the property is located in a rural or farming area. See Halladay v. Cluff at p. 501, Fn. 6. For farmland, adhering to established fence lines might be the very best way of promoting "repose of title and stability in boundaries." Id. at 505. Further, if the parties relied on a survey which was in error, "that is a clear instance of objective uncertainty." Id. at 508, Fn. 7.

It is clear from Halladay that if owners of farm land in fact build a fence based on a survey, that would be the very best that they could do under the circumstances. Their reliance on a fence (even based on an incorrectly surveyed boundary line) would in fact constitute the true boundary between the parties if the parties accepted it as such for a long time. That is exactly what happened here. There is no question, as shown from the various affidavits, that the fences in question were set according to one or more very early surveys and that said survey(s) were erroneous. There was thus no reasonable basis for those who built houses and fenced farm lands in this area to deal with this matter than other than as they did.

The fact that there now appears to be a correct survey which cuts the Shanes' home in half and which totally precludes the Yokums from using their house does not change what happened before. If, as appellants contend, fence lines established pursuant to an erroneous survey and acknowledged for at least 50 years by the property owners on both sides to be the dividing line between the properties do not establish the legal boundary,

it is submitted that virtually every rural fence in the State of Utah is in doubt. A fence line in a rural area would always be subject to the most recent survey, forcing property lines to shift in accordance with a new survey. That is particularly true since there are many fences in the State of Utah which were established by well-meaning surveyors who, because of their primitive methods, were off on their surveys.

As a further anomaly, this Court has previously bound a seller to a representation that it was selling all of the land within two fence lines, even though the precise legal description found in the written contract did not include all of that land. Nevertheless, this Court required the seller to perform based on fence lines and not on the legal description. See Jensen v. Manila Corporation, 565 P.2d 63 (Utah 1977).

POINT II

THE APPEAL IS OF THE ENTIRE DECISION OF THE COURT

Appellants have tried to make the claim that their only argument is with respondents Ainsworth and that they have no dispute with the remainder of the parties. However, their notice of appeal does not make that limitation. It appeals the entire decision made below.

As can be seen from the Record at pages 252-253, respondent Staker has taken the position that either the fence line or the survey boundary lines should prevail, but that there should be consistency in the court's decision. The court below

found for the fence lines and Staker agreed with that position as being the better result. If this Court, however, were to find for appellants, then respondents Ainsworth would have the right to ask that that same ruling apply to their southern boundary which would then take some 75 feet from respondent Staker's property. Staker would then in turn have the right to ask the same from respondents Jensen, Shane and Yokum.

As was clearly enunciated in a recent decision of the Utah Court of Appeals, which interestingly enough, was a follow-on case to the Halladay v. Cluff case decided by this Court, that court affirmed the position that a party satisfied with the results of the district court need not cross appeal. In fact "a cross-appeal would not have been appropriate." Halladay v. Cluff, 739 P. 2d 643, 645 (Utah App. 1987). To so cross-appeal would be to take a position inconsistent with the position with which the party agreed. It would only be if this Court reverses the lower court decision that respondents have any need for taking further action.

Thus, it is clear that the appellants by their action are in fact seeking to overturn the decision of the lower court with regard to all of the fence lines involved in the lower court's decision. Hence any decision with regard to the boundary lines would be applicable to all parcels.

POINT III

THE CONSISTENCY OF THE FENCE LINE SHOWS THAT THEY WERE PLACED IN ACCORDANCE WITH A SURVEY.

Appellant suggests that the reason why fences were placed where they were is uncertain and unknown. However, contrary to that argument are the following uncontroverted facts:

1. The Holmes and their predecessors in interest have always regarded the fence line on their northern boundary to be their property boundary. R. at 73-74, 118-121.

2. The Holmes' property has never been held by holders of the title to Staker's property at any time and vice versa.

3. Each of the fences in question is approximately the same distance away from the current survey line, or in other words, around 75 feet. See the diagram on p.8 of this Brief.

4. There are survey markers in line with certain of the fences. R. at 195.

The foregoing suggests that the property owners in this rural area established their fence lines precisely on those boundaries that they thought separated each other's property. The fact that each one of them is consistent with the other in distance away from what is now being termed the correct survey line shows that there is indeed a definite pattern supporting the basis as to the placement of the fences in accordance with one or more earlier surveys. Naturally enough, the remoteness in time of the occurrence of the placement of the fences makes it difficult for any party to give exact information as to why the

fences were established where they now stand. However, respondent Staker submits that this is another basis for believing that this enormous length of time of acceptance of the fence line adds credence to the claim. The properties have traded hands over the years and there has been no thought other than that the fence lines were the boundary throughout.

POINT IV

THE BURDEN OF PROOF IS ON APPELLANTS

The Halladay case suggests (contrary to appellants' contention) that the burden of proof is on appellants in this case. Certainly that decision makes clear that the burden of proof enunciated in that case was specifically limited to that case and to those facts. Halladay v. Cluff, 685 P.2d 500, 507 (Utah 1984). This Court's decision in Halladay strongly suggests that the burden of proof in the instant case is allocated to appellants because of the overwhelming pattern of fences in relation to present survey lines in the whole area. It is not one isolated case of a dispute between two neighbors. Therefore, appellants should have the burden of proof of showing that there was no objective uncertainty. And they have not met that burden.

Certainly, the history of the early settlers of this State should suffice to note that if a man did not own a piece of property, and particularly 75 feet or so of it some 1,000 feet long, he did not fence it in and use it. Moreover, it is also well known that canals and ditches were constructed along

boundaries and often themselves constituted the boundary between parties as opposed to a fence. Therefore, considering the record ownership of the properties under the circumstances, it is more natural to assume that the construction of ditches and canals came after the establishment of fences as the boundary.

According to appellants' theory, there is no such thing as an incorrect survey on which one could base objective uncertainty because one can always have a correct survey. There is no question, for example, that the monument at the corner of South Temple and Main Street in Salt Lake City, which establishes the beginning point for all surveys in the state was in existence in 1856. R. at 164. Therefore, according to the appellants' argument, one could easily begin a survey from that Base and Meridian and survey correctly the land in question, even though it is located some 100 blocks south of that monument. But of course, that argument is not supported by any of the cases. Nor does even the fact that a good surveyor with modern equipment could have made a correct survey of the property in question from even a closer monument. The test, repeated over and over again in Halladay, is a "reasonably available" survey. The most reasonably available survey which anyone can name prior to the recent past is that of Mr. Rock, and that survey appears to have been wrong. R. at 163-165, 194.

POINT V

THERE IS NO MATERIAL ISSUE OF FACT WHICH REQUIRES FURTHER TRIAL

At the beginning of the hearing, the court asked the parties to declare by the end of the hearing whether there remained any factual disputes. (R. at 240.) Then after all the arguments had concluded, the court asked the parties to submit all additional matters by way of affidavit. (R. at 313-314, 319.) In response, some parties filed additional affidavits, namely one was filed on behalf of appellants and one was filed on behalf of respondents Ainsworth. With those additions, there is every indication from the parties that all materials necessary to decide this case were before the court. In fact, the court stated specifically: "[W]hat I gleam from you gentlemen#... is that there is no more factual matters and you want me to rule on it as a matter of law." R. at 319.

It is interesting that appellants should complain of materials submitted by affidavit from the respondents and yet, as part of their argument, rely on the affidavit of appellant Maxfield for the truthfulness of what one of the surveyors whose affidavit is before the court allegedly told Mr. Maxfield in a private conversation with no other parties present. R. at 169. Appellants do not present that supposed contradictory statement by way of affidavit from the surveyor himself and certainly the surveyor is no party to this action. Therefore, this Court can rightfully reject such portions of the various affidavits as is

appropriate, such as that extremely heresay material from Maxfield.

Taking only those portions of the various affidavits which are proper for the purposes of summary judgment, however, there still are really no material factual issues in this case. For the purpose of ordering summary judgment in favor of the fence lines as the boundaries between the various parcels, the lower court had all it needed. What more would a trial of the issues bring to bear on the subject? Certainly, it is doubtful that there could be any better information concerning exactly the methods and practices of Mr. Rock, the surveyor in the 1920's. Although not so stated, it appears that Mr. Rock is deceased. Certainly no one can seem to give any indication of his whereabouts. Nor are his records apparently extant (which is in keeping with his reputation of not being a very careful surveyor). R. at 165, 194.

It should be further apparent that there are no living witnesses to indicate the basis upon which either the Shane home or the Yokum home were built except to repeat the statements found in the affidavit of Melvin Lancaster, Teeples and others that everyone treated the fences as the boundaries. R. at 74-75, 118-121, 138-140. The fact that the home now occupied by the Shanes' appears to have been built prior to the Rock survey in the 1920's does not by itself elicit any testimony as to the exact basis upon which the home was built, i.e., why it was built on what appellants claim to be the property line. However, there

is no indication that there is any extant testimony that would better explain that matter.

In short, it is the nature of these kinds of cases that there is, in fact, many aspects of testimony which are missing and which have led the courts to adopt the theory of boundary by acquiescence to substitute, legally, for matters which cannot be determined, one way or another, out of the past. In fact, one of the major prerequisites for boundary by acquiescence is that the boundaries have existed for a long time. Thus, there is no basis for this Court to return this case for trial since there is no indication that at a trial of this matter any further critical and material facts would be established.

POINT VI

THIS COURT HAS NOT ABANDONED BOUNDARY BY ACQUIESCENCE

A recent law review article seems to imply that this Court has totally abandoned boundary by acquiescence and has done so by reason of confusion between the requirements for boundary by contract and boundary by acquiescence. See Backman, "The Law of Practical Location of Boundaries and the Need for an Adverse Possession Remedy" 1986 BYU Law Review 957,966. Even Justice Howe has expressed that concern. Stratford v. Morgan, 689 P.2d 360, 366 (Utah 1984). But despite that concern, there is basis left for the courts to find boundary by acquiescence and this is such a case. However, if appellants are right, then perhaps Justice Howe is correct that "the death knell" has sounded. Id.

CONCLUSION

This Court in numerous decisions as well as other courts and other jurisdictions faced with the same problem have constantly held it to be a significant goal in the law to avoid litigation relating to boundaries and to encourage neighbors to be neighborly. The fence lines in this particular case have been long respected by the various neighbors as being the boundary lines. Even when surveys in 1956 and again in the 1970's revealed differences between the legal description and the fence lines, no one bothered to contest the placement of the fences. Even respondent Staker, in initiating this action, did not elect to have his boundary set according to the survey line. Rather, the suit was started in the alternative with the preference stated in favor of the fences. On the other hand, when appellants acquired their land and learned that there was some 75 feet beyond their fence line which might conceivably be available to them, they acquired a quit claim deed to that strip. They then simply waited for the day when they could claim that strip even though during that entire period of time, they never used it or attempted to use it. It is submitted that the doctorine of boundary by acquiescence is not dead. Even applying the strongest language found in Halladay and the follow-on cases, there still exists boundary by acquiescence in this case. The lower court decision should be sustained.

Respectfully submitted this 21 day of September, 1987.

KESLER & RUST

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CERTIFICATE OF MAILING

I hereby declare that I caused to be mailed four true and correct copies of the foregoing brief in Case No. 870166, postage prepaid, this 21st day of September, 1987, to:

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